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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELDERT VEJAR-NUNEZ,

Defendant-Appellant.

No. 05-30124

D.C. No. CR-04-00240-MJP

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Submitted November 8, 2005**

Before: WALLACE, LEAVY, and BERZON, Circuit Judges.

Eldert Vejar-Nunez appeals his 84-month sentence after pleading guilty to one count of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a), (b)(1)(B), and 846. We have jurisdiction to review this timely

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We review the legality of a sentence de novo, *United States v. Delgado-Cardenas*, 974 F.2d 123, 126 (9th Cir. 1992), and we affirm.

Vejar-Nunez's only claim on appeal is that the district court erred in determining that the government's failure to file a USSG § 5K1.1 substantial assistance motion was not subject to review.

Vejar-Nunez correctly asserts that under *Wade v. United States*, 504 U.S. 181 (1992), and *Delgado-Cardenas*, a court can review the government's failure to make substantial assistance motions where those decisions are arbitrary or based on unconstitutional motives. *See Wade*, 504 U.S. at 185-87; *Delgado-Cardenas*, 974 F.2d at 126. However, Vekar-Nunez has failed to demonstrate that the government's decision not to file a USSG § 5K1.1 motion in this case was arbitrary or based on unconstitutional motives. *See United States v. Burrows*, 36 F.3d 875, 884 (9th Cir. 1994).

AFFIRMED.